



NUCLEAR ENERGY INSTITUTE

Michael A. Bauser  
Associate General Counsel

October 22, 2002

**BY HAND DELIVERY**

Mark J. Langer, Clerk  
United States Court of Appeals  
for the District of Columbia Circuit  
Room 5423, U.S. Courthouse  
333 Constitution Avenue, N.W.  
Washington, DC 20001

Re: State of Nevada, et al. v. United States Nuclear Regulatory Commission, et al. No. 02-1116

Dear Mr. Langer:

Enclosed please find for filing an original plus four copies of the "Response of Intervenor Nuclear Energy Institute, Inc. to 'Suggestion for In Tandem Consideration of Cases.'"

Thank you for your assistance.

Sincerely,

A handwritten signature in black ink that reads "Michael A. Bauser". The signature is written in a cursive, flowing style.

Michael A. Bauser  
Counsel of Record  
Nuclear Energy Institute, Inc.

Enclosures

cc (w/enclosure): Service List

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ORAL ARGUMENT SCHEDULED FOR MAY 5, 2002

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

|                                |   |             |
|--------------------------------|---|-------------|
| STATE OF NEVADA, et al.,       | ) |             |
|                                | ) |             |
| Petitioners,                   | ) |             |
|                                | ) |             |
| v.                             | ) | No. 02-1116 |
|                                | ) |             |
| UNITED STATES NUCLEAR          | ) |             |
| REGULATORY COMMISSION, et al., | ) |             |
|                                | ) |             |
| Respondents,                   | ) |             |
|                                | ) |             |
| NUCLEAR ENERGY INSTITUTE, INC. | ) |             |
|                                | ) |             |
| Intervenor.                    | ) |             |

**RESPONSE OF INTERVENOR  
NUCLEAR ENERGY INSTITUTE, INC.  
TO "SUGGESTION FOR IN TANDEM CONSIDERATION OF CASES"**

**I. INTRODUCTION**

Intervenor Nuclear Energy Institute, Inc. ("NEI") hereby responds to Petitioners' "Suggestion for In Tandem Consideration of Cases" (Suggestion"), dated October 9, 2002. Petitioners' Suggestion seeks to have three separate sets of cases, including this one – denominated as the "NRC Case" (the instant case); the "EPA Case" (No. 01-1258); and the

“Recommendations Case” (No. 01-1516); – scheduled for argument over the course of one or two days before, and decided by, a single panel of this Court. The Suggestion should be rejected for the reasons set forth below.

## II. ANALYSIS

Reduced to its essence, the gravamen of Petitioners’ argument supporting the Suggestion is that each of the three sets of cases in some way pertains to the federal government’s Yucca Mountain project. While this is true, the cases vary widely with respect to the facts and law pertinent to each.

First, the cases involve individual and discrete actions by three independent federal agencies, the Secretary of Energy (“Secretary”), and the President of the United States. Specifically, the NRC Case and EPA Case involve two separate rulemaking proceedings undertaken by those agencies and culminating in the adoption of 10 C.F.R. Part 63 and 40 C.F.R. Part 197, respectively. The Recommendations Case involves a third independent rulemaking, undertaken by the Department of Energy (“DOE” or “Department”) and resulting in the adoption of 10 C.F.R. Part 963; plus: (a) the Department’s preparation of an Environmental Impact Statement for the Yucca Mountain site, (b) the related recommendation of the site by the Secretary to the President, and (c) the subsequent recommendation of the site by the President to Congress.

In addition, the three sets of cases raise unique, discrete issues stemming from the application of different statutory schemes. For example, the EPA Case involves substantive

provisions of the Energy Policy Act of 1992;<sup>1</sup> and the Atomic Energy Act of 1954, as amended.<sup>2</sup> The NRC Case presents a unique, threshold jurisdictional issue pertaining to the Hobbs Act.<sup>3</sup> The Guidelines Case does not involve the application of provisions of any of these three statutes but, rather, is grounded in the mandates of the Nuclear Waste Policy Act of 1982, as amended;<sup>4</sup> and the National Environmental Policy Act of 1969, as amended.<sup>5</sup>

Petitioners argue in their Suggestion that proceeding “in tandem” before a single panel “makes sense, both from the standpoint of judicial economy and efficiency and in the interest of achieving the correct resolution of the issues raised in these cases . . . .”<sup>6</sup> In fact, however, the three sets of cases are already proceeding in a regular and orderly fashion. The Court has set briefing schedules for all of them, and established panels for two. Certainly the Court has long been aware of the pending cases and is best qualified to manage its own resources. Moreover, there is nothing peculiar about different panels hearing individual cases dealing with separate actions related to a common project.

Proceeding in accordance with Petitioners’ Suggestion, however, would likely result in significant delay. Briefing is already complete in the EPA Case, and oral argument has been set for February 20, 2003. Accordingly, a decision in the EPA Case might now be expected as early as next spring. Under the Suggestion, however, a decision would be substantially delayed as a result of revising the schedule in the EPA Case to correspond to that of the case which lags all of the others. In enacting the Nuclear Waste Policy Act (“NWPA”), Congress was responding to an urgent national need for a disposal repository. Congress intended that the program proceed

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<sup>1</sup> 42 U.S.C. §§ 797c *et seq*

<sup>2</sup> 42 U.S.C. §§ 2011 *et seq*

<sup>3</sup> 28 U.S.C. §§ 2341 *et seq*

<sup>4</sup> 42 U.S.C. §§ 10101 *et seq*

<sup>5</sup> 42 U.S.C. §§ 4321 *et seq.*

<sup>6</sup> Suggestion, p. 5.

expeditiously and, in fact, included specific provisions in the NWPA to limit the potential for disruptions arising from judicial review.<sup>7</sup> Jettisoning the existing processes and schedules now in place for the three subject cases -- and essentially tying any and all decisions to the least-advanced case -- would directly contradict the policy established by Congress that the program proceed expeditiously. The Court has already extended the briefing schedule in the Guidelines Case by more than two months at the behest of Petitioners.<sup>8</sup> Additional delay should not now be countenanced.

Finally, Petitioners also argue in favor of their Suggestion in terms of “minimiz[ing] the risk of decisions that are inconsistent.”<sup>9</sup> There need be no concern over potential inconsistency, however, since application of the doctrine of *stare decisis* will operate to preclude contradictory determinations.<sup>10</sup>

### III. CONCLUSION

For the foregoing reasons, the Court should reject Petitioners’ Suggestion and proceed in accordance with the currently established process and schedules.

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<sup>7</sup> See *Nevada v. Watkins*, 939 F.2d 710, 716 (9<sup>th</sup> Cir. 1991).

<sup>8</sup> See Order filed September 20, 2002.

<sup>9</sup> Suggestion, p. 5.

<sup>10</sup> See, e.g., *ITT Industries v. NLRB*, 251 F.3d 995, 1000 (D.C. Cir. 2001) (once the Court has settled on a statute’s meaning, that meaning is employed subsequently in evaluating agency action).

Respectfully submitted,

A handwritten signature in black ink, reading "Michael A. Bauser". The signature is written in a cursive style with a horizontal line underneath it.

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Dated: October 22, 2002

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 02-1116

Dated: October 22, 2002

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